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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/730,709
Filing Date: December 08, 2003
Appellant(s): SPADINI ET AL.

Alan A. Bornstein
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed July 13, 2009 and August 14, 2009 appealing from the Office action mailed December 10, 2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

This appeal involves claims 1-6, 8-12, 14, 15 and 18.

Claims 19 and 20 are withdrawn from consideration as not directed to the elected species.

Claims 7, 13, 16 and 17 have been canceled.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6177092	Lentini et al.	1-2001
6063390	Farrell et al.	5-2000
4929644	Guilbeaux	5-1990
6161729	Gentile et al.	12-2000
5316054	Hall et al.	5-1994
5020694	Pettengill	6-1991

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103 – Obviousness

1) Claims 1-4, 12, 14, 15 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lentini et al. (US 6,177,092) in view of Farrell et al. (US 6,063,390) and Guilbeaux (US 4,929,644).

Lentini et al. disclose self-foaming cleansing systems. The cleansing systems may be anhydrous. The anhydrous compositions are added to water to produce an effervescent effect composition. One component comprises a bicarbonate component (col. 3, lines 39-53). The second component includes an acid. The two reactive components can be dispensed from physically separate packages or from a unitary package with chambers. The components of either type of packages can be applied simultaneously or substantially simultaneously to the skin, where they commingle and react (col. 2, lines 17-30). The compositions may be formulated into solutions, colloidal dispersions, suspensions and gels (col. 6, lines 38-61).

The reference differs from the instant claims insofar as it does not disclose a specific example of a nonaqueous component comprising both active agents together in combination with an aqueous component and an organophilic particle.

Farrell et al. disclose skin compositions comprising an intimate mixture of an acid such as citric acid and an alkaline material such as sodium bicarbonate (abstract). The compositions also comprise surfactants and magnesium silicate (Tables).

The reference differs from the instant claims insofar as it does not disclose the components are in one chamber and water is in another chamber.

Guilbeaux disclose thickened organic compositions having biocidal activity. The compositions use organophilic clays in combination to provide the thickening and biocidal activity. Organophilic clays are also used in cosmetic formulations. However, since typical cosmetic formulations generally last several months and are opened frequently while coming in contact with human hands and the environment, cosmetics are exposed to a variety of microorganisms. Absent some type of biocide, these preparations could eventually introduce undesirable microorganisms onto the human skin, eyes or mucous membranes. The concept behind employing the two defined organophilic clays involves combining one which will impart superior rheological properties to the organophilic clay with another which will impart excellent biocidal activity to the composition. Hence, the composition will not need other biocidal agents which can cause adverse (e.g., allergic) reactions especially if the composition is to be used topically. Advantageously, it has been discovered that the overall rheological properties of the organophilic clay will not be diminished and may even be enhanced by adding the organophilic clay with biocidal activity to the organic composition. Furthermore, by providing a combination of first organophilic clays and/or a combination of second organophilic clays, the thickening and biocidal activity can be tailored to the desired level for a given organic composition (col. 7, line 60 to col. 8, line 18).

The reference differs from the instant claims insofar as it does not disclose the compositions are two part compositions comprising a first component that reacts with a second component.

It would have been obvious to combine the bicarbonate and acid in the same chamber when in an anhydrous composition of Lentini et al. because it has been disclosed in the art that the two components do not react in a dry state and the two components have been disclosed by the art in combination in anhydrous skin care compositions, as supported by Farrell et al.

It would have been obvious to one of ordinary skill in the art to have used a combination of organophilic clays in the compositions of Lentini et al. and Farrell et al. motivated by the desire to incorporate a rheology modifier suitable for cosmetics that thickens the compositions as desired and acts as a biocidal agent and remove the need for other biocidal agents that may cause adverse reactions, as disclosed by Guilbeaux.

In regards to claims 12 and 14, normally, changes in result effective variables are not patentable where the difference involved is one of degree, not of kind; experimentation to find workable conditions generally involves the application of no more than routine skill in the art. See MPEP 2144.05. It would have been obvious to one of ordinary skill in the art to use a particular particle size motivated by the desire to obtain a composition with optimal efficacy when the components are mixed and react with one another.

2) Claims 10 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lentini et al. (US 6,177,092) in view of Farrell et al. (US 6,063,390) and Guilbeaux (US 4,929,644) as applied to claims 1-4, 12, 14, 15 and 18 in further view of Gentile et al. (US 6,161,729).

Lentini et al., Farrell et al. and Guilbeaux are discussed above. The references differ from the instant claims insofar as they do not disclose the type of valves or specific types of bottle used to store and deliver the compositions.

Gentile et al. disclose dual chamber dispenser having a duckbill valve. The duckbill valve is suitable as a metering valve and has closable valves giving the option of different flow rates for each disclosed component (col. 2, lines 46-54). The valves may also have an anti-suck back functionality, which restricts air from entering the tube after each extrusion stroke (col. 3, lines 30-35).

The reference differs from the instant claims insofar as it does not disclose the compositions that are stored in the dispensers are skin compositions comprising two reactive agents, and an organophilic particle.

It would have been obvious to one of ordinary skill in the art to have used the dispensers to store the compositions of Lentini et al., Farrell et al. and Guilbeaux motivated by the desire to keep the two components separate and to be able to deliver different amounts of each component to the targeted site when necessary or to control the delivery of each component when the components have different flow rates, as disclosed by Gentile et al.

3) Claims 5-6 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lentini et al. (US 6,177,092) in view of Farrell et al. (US 6,063,390) and Guilbeaux (US 4,929,644) as applied to claims 1-4, 12, 14, 15 and 18 in further view of Hall et al. (US 5,316,054).

Lentini et al., Farrell et al. and Guilbeaux are discussed above. The references differ from the instant claims insofar as it does not disclose the type of cap used on the dispensers.

Hall et al. disclose container caps that have markings for measuring compositions inside a container. The primary objective of the caps is to enable quick and easy dosing of a highly concentrated liquid that is diluted with water by a certain ratio (col. 3, lines 19-23). A fill line is provided for the user in order for the correct amount of water to be added to the concentrated liquid. The cap also comprises a reservoir for the concentrated liquid so the correct amount of liquid is used (see Abstract).

The reference differs from the instant claims insofar as it does not disclose the type of composition used.

It would have been obvious to one of ordinary skill in the art to have used the caps when dispensing or storing the compositions of Lentini et al., Farrell et al. and Guilbeaux motivated by the desire to deliver the desired amount of each component to the targeted site by being able to measure the amount of the two components when mixing, as disclosed by Hall et al.

4) Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over Lentini et al. (US 6,177,092) in view of Farrell et al. (US 6,063,390) and Guilbeaux (US 4,929,644) as applied to claims 1-4, 12, 14, 15 and 18 in further view of Pettengill (US 5,020,694).

Lentini et al., Farrell et al. and Guilbeaux are discussed above. The references differ from the instant claims insofar as they do not disclose a container with a pump.

Pettengill discloses multi-cavity dispensing containers. The containers are a rigid piston-type multi-cavity dispensing container for simultaneous coextrusion of two or more flowable materials in a predetermined proportion. The container has a unique outlet which is arranged to cause the outlet streams of material to flow towards each other. The outlet maintains the segregation of the different materials as they move simultaneously outward through the outlet (Abstract). The containers comprise a pump (col. 2, lines 58-60).

The reference differs from the instant claims insofar as it does not disclose the compositions that are stored in the dispensers are skin compositions comprising two reactive agents, and an organophilic particle.

It would have been obvious to one of ordinary skill in the art to have used the dispensers to store the compositions of the combined references of Lentini et al., Farrell et al. and Guilbeaux motivated by the desire to keep the two components separate and to be able to deliver each component to the targeted site simultaneously in a predetermined proportion, as disclosed by the Pettengill.

(10) Response to Argument

1) Claims 1-4, 12, 14, 15 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lentini et al. (US 6,177,092) in view of Farrell et al. (US 6,063,390) and Guilbeaux (US 4,929,644).

Appellant's Arguments

Appellant submits the disclosure of Lentini, et al., in view of Farrell, et al., and Guilbeaux fails to disclose a first component in a dispersed phase capable of chemically reacting with a second component and wherein both the first and second components are contained in the first chamber, (i.e., a single chamber). Appellant argues the skilled person reading Lentini, et al., would understand that the sachet must be a "unitary package with chambers" separately containing each of the acid and bicarbonate so as to prevent their premature reaction with each other prior to being added to a bath because it teaches two part compositions. In response, applicants respectfully submit that the meaning of "sachet" must be gleaned by the skilled person from the overall disclosure of Lentini. Appellants submit that the skilled person would understand "sachet" to have compartments.

Further Farrell et al., teach away from reducing the degree of intimate contact of the dry reactive materials by suspending them in the anhydrous carrier required in instant claim 1(c). The skilled person would not have been motivated to reduce the

intimate contact of the dry powder in Farrell, et al., by suspending such powder in an inert medium as disclosed by Guilbeaux.

Examiner's Response

The Appellant is arguing the references separately in a piecemeal analysis. The Examiner disagrees with Appellants arguments and submits that one of skill in the art would not come to the conclusion that the sachet must comprise chambers in order to keep the two reacting agents separate. Lentini et al. discloses that the two components react in the presence of water. Thus, one of ordinary skill in the art would conclude that the two components are not reactive in a nonaqueous or anhydrous environment and would be stable under these conditions in a sachet without being separated. The teachings of Farrell et al. support this conclusion by disclosing that two reactive components may be in intimate contact in a dry form. It is not until the components are in contact with water that they react. Lentini et al. also discloses that the components may exist in a nonaqueous environment. Based on the teachings of Lentini et al. and Farrell et al., one of ordinary skill in the art would reasonably conclude that the two components could be stored in one compartment without reacting with one another because no water is present. In regard to Guilbeaux, Guilbeaux is used to modify the primary reference of Lentini et al. in view of Farrell not Farrell alone. Lentini et al. disclose the use of antimicrobials and formulating the compositions into gels. Guilbeaux teaches the advantages of using organic clays as thickeners because they have biocidal properties. Thus one of skill in the art would be motivated to use the clays when

formulating gels with the compositions of Lentini et al., because the clays not only thicken the compositions but also provide biocidal activity.

2) Claims 10 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lentini et al. (US 6,177,092) in view of Farrell et al. (US 6,063,390) and Guilbeaux (US 4,929,644) as applied to claims 1-4, 12, 14, 15 and 18 in further view of Gentile et al. (US 6,161,729).

Appellant's Arguments

Appellants submit a prima facie case of obviousness has not been made because Gentile et al. fail to remedy the deficiencies of Lentini et al.

Examiner's Response

See Examiner's response above in regard to Lentini et al. In regard to Gentile et al., the reference discloses dispensers appropriate for storing and delivering two component compositions of the combined teachings of Lentini et al., Farrell et al. and Guilbeaux, and thus remedies the deficiencies of Lentini et al.

3) Claims 5-6 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lentini et al. (US 6,177,092) in view of Farrell et al. (US 6,063,390) and Guilbeaux

(US 4,929,644) as applied to claims 1-4, 12, 14, 15 and 18 in further view of Hall et al. (US 5,316,054).

Appellant's Arguments

Appellants submit a prima facie case of obviousness has not been made because Hall et al. fail to remedy the deficiencies of Lentini et al.

Examiner's Response

See Examiner's response above in regard to Lentini et al. In regard to Hall et al., the reference discloses container caps and the motivation of why one of ordinary skill in the art would want to use these caps and thus remedies the deficiencies of Lentini et al.

4) Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over Lentini et al. (US 6,177,092) in view of Farrell et al. (US 6,063,390) and Guilbeaux (US 4,929,644) as applied to claims 1-4, 12, 14, 15 and 18 in further view of Pettengill (US 5,020,694).

Appellant's Arguments

Appellants submit a prima facie case of obviousness has not been made because Pettengill fails to remedy the deficiencies of Lentini et al.

Examiner's Response

See Examiner's response above in regard to Lentini et al. In regard to Pettengill, the reference discloses containers with multiple compartments and the motivation of why one of ordinary skill in the art would want to use these containers for storing and dispensing the compositions of the combined teachings of Lentini et al., Farrell et al. and Guilbeaux, and thus remedies the deficiencies of Lentini et al.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Frederick Krass/

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/Lezah W Roberts/
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